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I. Introduction

A. The Sausers' Tragedy

Jon and Margaret Sauser have two sons who have suffered the effects of lead poisoning.[1] According to the Sausers, they purchased an old house that needed renovation, and during the renovation their older son, then two years old, lived with them. Several months into the renovation, their son became restless and unable to sleep at night. He was diagnosed by a pediatrician as having Attention Deficit Disorder with Hyperactivity and Tourette Syndrome. Mrs. Sauser then gave birth to her younger son during the renovation who immediately developed respiratory disease and a variety of other illnesses. The Sausers eventually had their sons tested for lead poisoning, and both tests revealed elevated blood lead levels apparently due to the inhalation of lead dust by their sons during the renovation. Today, as a result of their exposure to lead-based paint, the Sausers' older son must take hyperactivity medicine regularly and the younger son must use a breathing machine at least four times a day because he has suffered permanent lung damage.[2] Prior to these events, the Sausers were unaware of the dangers lead-based paint may pose to infants and children. The focus of this paper will be a federal law sometimes referred to as the Title X Section 1018 Rule, or the Lead-Based Paint Disclosure Rule, which may have helped prevent the Sausers' tragedy.

B. The Dangers of Lead

One out of every eleven children in the United States has dangerous levels of lead in their blood.[3] The two most common ways for lead to enter a child's body are: (1) when a child touches a surface

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1 Margaret Sauser, Address at the White House Press Conference to announce the Campaign for a Lead-Safe America (Nov. 17, 1997).

2 *Id.*

3 U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. CONSUMER PRODUCT SAFETY COMMISSION AND U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME 2 (1995) [hereinafter "PROTECT YOUR FAMILY FROM LEAD"].

containing lead-based paint and later puts his hand on his mouth; and (2) through breathing airborne lead dust, as the Sausers' children.[4] A childhood blood lead level of 10 micrograms per deciliter (ug/dl) or above is considered to be above normal.[5] Studies have shown that young children, particularly children under six, are more susceptible to lead poisoning than adults because children have a higher tendency to put their hands in their mouths and their bodies absorb lead more readily.[6] In addition, studies have shown that because the brains and nervous systems of children are still developing, lead-poisoning may cause irreparable harm.[7] The effects of lead poisoning include damaged hearing, learning and behavioral problems, stunted growth, inattentiveness, hyperactivity and brain damage.[8] Recently, a study also found that lead poisoning can cause tooth decay in children.[9] These health problems may last well into adulthood and could directly impact an individual's potential to make a living or to make a positive contribution to society.[10]

Lead is a toxic substance that does not provide any known benefits to humans.[11] Some have even attributed the fall of the Roman Empire to lead poisoning.[12] Nonetheless, throughout human

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4 *Id.*

5 U.S. ENVIRONMENTAL PROTECTION AGENCY, PREVENTION, PESTICIDES AND TOXICS SUBSTANCES, LEAD IN YOUR HOME: A PARENT'S REFERENCE GUIDE 19 (1998) [hereinafter "A PARENT'S GUIDE"].

6 PROTECT YOUR FAMILY FROM LEAD, *supra* note 3, at 2; A PARENT'S GUIDE, *supra* note 5 at 1.

7 *See* PROTECT YOUR FAMILY FROM LEAD, *supra* note 3, at 2-3.

8 *Id.* at 3.

9 John O'Neil, *Lead Poisoning Tied to Child Tooth Decay*, N.Y. TIMES, June 23, 1999 at A15.

10 Eduardo Palazuelos-Rendon, *Effects of Lead on Children's Health, in* LEAD IN THE AMERICAS 59 (Institute of Medicine USA and National Institute of Public Health Mexico 1997).

11 *Id.*

12 PAUL R. EHRLICH, THE POPULATION BOMB 40 (1971). According to the author, the Romans lined their bronze cooking, eating and wine storage vessels with lead. They also used it in the form of lead pipes and paints, and the examination of the bones of Romans show high concentrations of lead. He

history, lead has been used by humans in many useful products that have contributed to our advancement, i.e., gasoline, household water pipes, food cans, cooking utensils and, of course, paint.[13] Paint manufacturers put lead pigments in paint because it adhered well to surfaces and increased the viability of the paint, and oil companies added lead to gasoline because lead helped stop engine knocking in cars.[14] As humans became aware of the dangers posed by lead, they limited their exposure to it and banned its use in many products, including paint.[15] Despite the ban, lead is still prominent in the human environment because it was used so often before its harmful effects were truly known and its use was banned.

The U.S. Environmental Protection Agency (EPA) has found that lead-based paint is present in over three-quarters of America's homes built before 1980, but minimal risk is posed by lead-based paint if it is not peeling, chipping, chalking or cracking.[16] A paint inspection conducted by a licensed, professional lead inspector can determine the lead content of painted surfaces.[17] Generally, a lead inspector will use an X-Ray Fluorescence Machine (XRF) or have a sample of paint analyzed by an accredited laboratory to determine the lead content of painted surfaces.[18] Lead-based paint may be permanently removed from a structure or building by having a licensed contractor conduct one of four types of structural lead abatements: replacement, encapsulation, enclosure or paint removal.[19]

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concludes that "overexposure to lead was a factor in the decline of the Roman Empire."

13 A PARENT'S GUIDE, *supra* note 5, at 1. *See also* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF LEAD HAZARD CONTROL, MOVING TOWARD A LEAD-SAFE AMERICA, A REPORT TO THE CONGRESS OF THE UNITED STATES 5-6 (1997) and GREEN MOUNTAIN INSTITUTE FOR ENVIRONMENTAL DEMOCRACY, THE I FILES: BLOOD LEAD LEVELS, SYNERGY 7 (1998).

14 A PARENT'S GUIDE, *supra* note 5, at 1.

15 *Id.*

16 *Id.* at 2.

17 *Id.* at 8.

18 PROTECT YOUR FAMILY FROM LEAD, *supra* note 3, at 6.

19 A PARENT'S GUIDE, *supra* note 5, at 41.

Replacement of windows, doors and molding can be essential to getting rid of the hazards posed by lead-based paint.[20] Enclosure requires building a new lead-free structure, such as a new ceiling, floor or pipe, over an existing one that contains lead.[21] Encapsulation requires the use of special paint to cover an existing coat of lead-based paint.[22] Paint removal includes wet scraping of loose paint, off-site chemical stripping of mantels and metal railings, and use of a heat gun to remove thick layers of paint.[23] Permanent removal of lead from the human environment is one of many ways to address this problem, so legislative guidance was needed to develop the most suitable strategy. Once Congress became fully aware of the dangers of lead-based paint, it was spurred into action and passed one of the most comprehensive laws concerning lead in human history.

C. Title X Overview

Congress passed Title X of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X) to prevent tragedies like the Sausers' from happening to other American families.[24] Title X provides a comprehensive plan that includes educating the public about the dangers of lead-based paint and urging the private sector and government to conduct activities to reduce lead, such as abatement, in the nation's older housing stock.[25] Title X also authorizes grants to eliminate the presence of lead-based paint in older houses; compels mandatory lead inspections and abatement in federally-assisted housing; and establishes a task force to study ways to address the lead poisoning problem, lead-based paint in target housing, and research and development.[26]

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20 *Id.* at 41-42.

21 *Id.* at 41-43.

22 *Id.* at 41-44.

23 *Id.* at 41, 44-45.

24 The Residential Lead-Based Paint Hazard Act of 1992, 42 U.S.C. §§ 4851- 4852 (1995).

25 42 U.S.C. § 4851a.

26 42 U.S.C. § 4851-52.

II. What is Section 1018 of Title X?

A. Section 1018

As previously stated, the focus of this paper is Section 1018 of Title X.[27] Section 1018 provides for disclosure of information on lead-based paint and/or lead-based paint hazards in most pre-1978 housing, with two exemptions. Pre-1978 housing is defined in Title X as "target housing." The Consumer Product Safety Commission banned lead in household paint in 1978.[28] Therefore, the requirements of Section 1018 apply to all pre-1978 housing because the household paint used in such housing most likely contained lead given the widespread use of lead as a paint ingredient prior to 1978.[29]

Section 1018 directs EPA and the U.S. Department of Housing and Urban Development (HUD) to jointly issue regulations requiring disclosure of information by lessors, sellers and agents regarding lead-based paint and its hazards to prospective lessees and purchasers before such lessees and purchasers are obligated under any contract to lease or buy target housing.[30] In addition, each contract to lease or sell target housing must include a Lead Warning Statement, which ensures that a prospective purchaser or lessee has been informed of the dangers of lead-based paint.[31]

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27 42 U.S.C. § 4852d.

28 U.S. ENVIRONMENTAL PROTECTION AGENCY, PREVENTION, PESTICIDES AND TOXICS SUBSTANCES, QUESTIONS AND ANSWERS ON EPA AND HUD'S PROPOSED LEAD-BASED PAINT DISCLOSURE REQUIREMENTS 6 (1994).

29 *Id.*; A PARENT'S GUIDE, *supra* note 5, at 1.

30 42 U.S.C. § 4852d(a)(1).

31 42 U.S.C. § 4852d(a)(3). The Lead Warning Statement states as follows: "Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection

B. What is the Point of Disclosure?

Since Section 1018 requires disclosure of information before the purchaser or lessee is obligated under any contract to purchase or lease target housing, it begs the question: at what point in the real estate transaction must disclosure be made?

The point of obligation is especially relevant in transactions involving the sale of target housing because, unlike a rental transaction, a sales transaction normally has many stages, often involving contingencies that directly impact whether the parties will complete such transaction. For instance, in a typical real estate transaction, the seller will list the property at a particular price on the open market and the prospective purchaser will present an "offer" in a purchase contract containing contingencies, such as an appraisal or termite inspection. If the seller accepts the price in the purchase contract, then the seller will submit his acceptance in writing to the purchaser. At this point, the parties will have a legally binding contract that is subject only to the contingencies in the purchase agreement. Therefore, if disclosure is made after the parties have a binding contract, then the purchaser may not be able to void the contract if lead is subsequently found in the property.

No doubt EPA and HUD believe that the point of obligation for disclosure is before the parties enter into a purchase contract or lease.[32] The rationale is that Congress intended for disclosure to be made as early as possible in the transaction, so the parties would have the opportunity to include provisions addressing any lead issues in the sales contract or lease, and to make an informed decision on whether to enter into the agreement. Further, requiring disclosure before the parties are bound by a sales contract or lease will arguably make enforcement easier for EPA and HUD officials who would only need to review such contract or lease to determine when the parties signed

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for possible lead-based paint hazard is recommended prior to purchase."

[32] Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing; Final Rule, 61 Fed. Reg. 9064, 9071 (proposed 1996) (codified at 40 C.F.R. § 745, subpt. F (1999) and 24 C.F.R. § 35, subpt. E (1999)) [hereinafter "Final Rule"].

it in relation to the signing of the Disclosure Form.

Some might disagree with this interpretation of the point of disclosure since many real estate sales transactions are actually voided after signing a purchase contract. This often occurs when a party fails to satisfy a contingency, such as securing the proper financing.

Others, however, would agree that up front disclosure, as early as possible in the transaction, is logical and fair to both the regulated community and consumers. The regulated community, i.e., real estate agents, sellers, and lessors, has a legal and ethical obligation to fully understand and comply with the statutory requirements. Conversely, most consumers are likely unaware of the disclosure requirements, especially in the current housing market boom, which is full of first-time home buyers. Consequently, an information gap exists between consumers and the regulated community, and because the regulated community has the information advantage, it would be unconscionable to allow the regulated community to delay disclosure.

C. Proving a Violation under Section 1018

Section 1018's provisions dealing with proving violations provide a different standard of proof for HUD than for EPA. Section 1018(b)(1) provides that any person who "knowingly" violates Section 1018 shall be subject to civil monetary penalties imposed by HUD.[33] Section 1018(b)(5), however, states that any person who violates Section 1018 shall be liable under Section 409 of the Toxic Substances Control Act (TSCA) which is administered by EPA.[34] A few important points must be made about these differing standards. First, it appears that HUD's authority to bring enforcement actions for Section 1018 violations is limited to those members of the real estate community who "knowingly" commit a violation. Conversely, EPA, which is responsible for enforcing the TSCA, is allowed to take action against any person who violates Section 1018 without

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33 42 U.S.C. § 4852d(b)(1).

34 42 U.S.C. § 4852d(b)(5).

establishing that the violation was committed "knowingly" since the TSCA is a strict liability statute.[35] Nothing in the legislative history or the statute indicates why Congress created these two different standards.

HUD is not severely limited by having to prove a "knowing" violation. In a recent HUD civil administrative case brought against a property management firm for failure to comply with the disclosure requirements, the violator argued that although it had violated Section 1018, it did not "knowingly" do so.[36] The HUD Administrative Law Judge (HUD ALJ) flatly rejected this argument stating that HUD's civil money regulations at 24 C.F.R. § 30, under which the case was brought, defines "knowingly" as "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition" under Section 1018.[37] In addition, the HUD ALJ also noted that Section 1018(b)(1) provides that anyone who knowingly commits a violation is subject to penalties under Section 102 of the HUD Reform Act of 1989, which contains the same definition of "knowingly."[38]

The practical impact of this differing standard of proof is not significant as long as HUD and EPA confer on enforcement cases. It is unlikely that either would take separate enforcement actions against the same violator involving the same violations. Thus, in cases where HUD would likely have difficulty proving that the violator

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35 TSCA § 409 states in relevant part that it is unlawful "for any person to fail or refuse to comply with . . . any rule . . . issued under this subchapter [subchapter IV]." (Subchapter VI became part of TSCA through Subtitle B of Title X. 15 U.S.C. § 2689 (1995). The words "fail or refuse" make it clear that any person who commits a violation of TSCA § 409 is strictly liable. *See also* In the Matter of Bickford, Inc, Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, Nov. 28, 1994 (intent is irrelevant to determine liability under TSCA); In the Matter of Leonard Strandley, TSCA Appeal No. 89-4, 3 E.A.D. 718, 722 (CJO, Nov. 25, 1991) (lack of intent to violate any provision of TSCA is not a defense).

36 *In re* American Rental Management Company, et al., HUDALJ 99-01-CMP at 12 (May 26, 2000).

37 *Id.* at 12.

38 *Id. See also* HUD Reform Act of 1989, 42 U.S.C. § 3545 (1995).

"knowingly" committed the violation, the matter could be referred to EPA.

D. Right of Lessees and Purchasers to Seek Damages

The real estate community should be wary that the cost of noncompliance is high. A violator runs the risk of having to pay either EPA or HUD a monetary penalty for noncompliance and/or being named a defendant by a lessee or purchaser in a civil lawsuit under Section 1018(b)(3). The penalties provisions of Section 1018 is subsection (b)(3), which provides that purchasers and lessees have the right to seek redress against any member of the real estate community that fails to comply with the disclosure requirements.[39] This section grants the right to pursue a civil action against a seller, lessor or agent who knowingly fails to comply with Section 1018 or the regulations issued thereunder in a real estate transaction.[40] This private cause of action allows purchasers and lessees to recover treble damages, court costs and attorneys' fees.[41]

III. The Disclosure Rule

A. The Impact of Late Effective Date of Rule on Private Lawsuits

The promulgation of the rule by EPA and HUD was one of the early sources of controversy surrounding Section 1018. In two provisions of Section 1018, Congress provided explicit instructions on when the rule should be issued.

First, in Section 1018(a)(1), Congress stated that no later than two years after Title X was passed, EPA and HUD shall issue a proposed rule based on Section 1018.[42] Title X was passed by Congress on October 28, 1992, so Congress effectively directed EPA and HUD to jointly promulgate regulations no later than October 28, 1994. EPA and HUD actually issued the proposed regulations on

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39 42 U.S.C. § 4852d(b)(3).

40 *Id.*

41 42 U.S.C. § 4852d(b)(4).

42 42 U.S.C. § 4852d(a)(1).

November 2, 1994, five days after the statutory deadline.[43]

Second, in Section 1018(d), Congress stated that "the regulations under this section shall take effect [three] years after" Title X was enacted.[44] The proposed regulation stated that the disclosure requirements would become effective on October 28, 1995, three years after the October 28, 1992 enactment of Title X.[45]

The final regulation did not meet the statutory deadline. It was published in the Federal Register on March 6, 1996 and provided a further extension.[46] The rule is commonly known as the Real Estate Notification and Disclosure Rule (Disclosure Rule). The following was stated in the preamble of the Disclosure Rule regarding the extension:

> . . . for owners of more than four residential dwellings, the requirements are applicable on September 6, 1996 and . . . for owners of one to four residential dwellings, the disclosure requirements set forth in the regulations do not take effect until December 6, 1996.[47]

B. The Sweet and Sipes Cases

This extension of the regulatory effective date has caused problems for individuals seeking damages against members of the real estate community who failed to comply with the Disclosure Rule.

Two federal circuit cases demonstrate how this extension has created problems for lessees who have sued lessors under Section 1018(b)(3).

In Sweet v. Sheahan, the plaintiff leased target housing from

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43 Lead-Based Paint Poisoning Prevention in Certain Residential Structures, 59 Fed. Reg. 54,997 (proposed 1994) (codified at 40 C.F.R. § 745, subpt. F (1999) and 24 C.F.R. § 35, subpt. E (1999)) [hereinafter "Proposed Rule"].

44 42 U.S.C. § 4852d(d).

45 Proposed Rule, *supra* note 43, at 54,997.

46 Final Rule, *supra* note 32, at 9064.

47 Final Rule, *supra* note 32, at 9064.

the defendant with a term from December 1, 1995 to October 1996.[48] The plaintiff alleged that her infant son was poisoned by lead-based paint shortly after residing in the target housing and that the defendant failed to comply with the Disclosure Rule requirements.[49] The plaintiff asserted several state law claims along with the federal claim under Section 1018(b)(3).[50] The defendant responded that he was not legally obligated to comply with the Disclosure Rule at the time the term of the lease commenced, December 1, 1995.[51] Thus, the issue was whether the statutory effective date provided by Congress in Section 1018 or the regulatory effective date in the final version of the Disclosure Rule governed. As the district court noted "if the answer is the former, Sheahan [the defendant/lessor] would have owed a duty of disclosure to the plaintiff, and subject matter jurisdiction would exist; if the latter date is applicable, then subject matter jurisdiction would be lacking."[52] The court held for the plaintiff and stressed that "Congress expressly and unambiguously stated that the regulations 'shall take effect' on October 28, 1995" and that the regulatory effective date "which contravenes the clear will of Congress, cannot be enforced."[53]

In Sipes v. Russell, the plaintiff leased target housing from the defendant with the lease beginning on July 1, 1996.[54] After moving into the target housing, the plaintiff alleged that her son was poisoned by lead-based paint and that the defendant/lessor failed to comply with Section 1018.[55] Like the plaintiff in Sweet v. Sheahan, the Sipes plaintiff asserted state law claims, as well as the federal claim under Section 1018(b)(3).[56] The defendant moved for dismissal arguing that

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48 Sweet v. Sheahan, No. 97-CV-1666, 1999 WL 1011921 at *1 (N.D.N.Y. Nov. 5, 1999).

49 *Id.*

50 *Id.*

51 *Id.* at *2.

52 *Id.* at *1.

53 *Id.* at *3.

54 Sipes v. Russell, 89 F.Supp.2d 1199, 1200 (D. Kan. 2000).

55 *Id.* at 1201.

56 *Id.*

the Disclosure Rule was not effective until after the parties entered into the lease agreement.[57] The plaintiff contended that the statutory effective date of October 28, 1995 governed.[58] The court accepted the defendant's position. The court reasoned that postponement of the applicability of the Disclosure Rule served as a one year compliance assistance period provided by EPA and HUD to the regulated community, which would allow it to become familiar with the Disclosure Rule and achieve compliance.[59]

If nothing else, these two cases show that the general public is well aware of its right to seek damages against members of the real estate community who fail to comply with the Disclosure Rule.

C. Disclosure Rule Overview

EPA and HUD codified identical versions of the Disclosure Rule in different Titles of the Code of Federal Regulations (C.F.R.). EPA's version can be found at 40 C.F.R. § 745(F), and HUD's version can be found at 24 C.F.R. § 35(E).[60]

The regulatory date extension of one year previously discussed was reasoned to provide the real estate community with more time to achieve compliance before enforcement.[61] This compliance assistance period, however, only applied to minor violations.[62] EPA agreed not to conduct compliance inspections during this time but reserved the right to take an enforcement action against any violator who committed an egregious violation if they received a complaint, investigated, and found violations. During the compliance assistance period, EPA and HUD provided enormous compliance assistance and outreach to the regulated community. For

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57 *Id.*

58 *Id.*

59 *Sipes*, *supra* note 54, at 1204.

60 Final Rule, *supra* note 32, at 9064.

61 JESSE BASKERVILLE, DIRECTOR, TOXICS AND PESTICIDES ENFORCEMENT DIVISION, EPA OFFICE OF REGULATORY ENFORCEMENT ON COMPLIANCE WITH TSCA LEAD 1018 RULE (Aug. 22, 1996) (on file with author).

62 *Id.*

instance, both EPA and HUD provided information packets on the Disclosure Rule, EPA regional lead coordinators conducted major presentations on the rule at public meetings attended by the real estate community, and HUD ran public service advertisements on radio and television.

The Disclosure Rule has all of the provisions contained in Section 1018, and it expanded terms, created additional exemptions and requirements, which were permissible under Section 1018.[63] EPA's version of the Disclosure Rule will be examined for purposes of this paper.

D. Exemptions to "Target Housing"

The Disclosure Rule provides additional exemptions to the definition of target housing, including various types of pre-1978 housing, beyond that which Congress provided in Title X.

EPA's and HUD's rules added the following four additional exemptions for pre-1978 housing in the Disclosure Rule: (1) sales of pre-1978 housing at foreclosure, (2) leases of pre-1978 housing that have been found lead-based paint free, (3) short-term leases of pre-1978 housing of 100 days or less and (4) renewals of existing leases involving pre-1978 housing in which disclosures were previously made. EPA and HUD also elaborated on the definition of pre-1978 "0-bedroom dwellings."[64]

Congress stated that the Disclosure Rule shall apply to target housing defined as housing built before 1978, with the following two exemptions: "0-bedroom dwellings" and "housing for the elderly and

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[63] *See* Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 844 (1984) (an executive agency has considerable flexibility to implement a federal program authorized by Congress).

[64] *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, OFF. OF POLLUTION PREVENTION AND TOXICS & U.S. HUD, OFF. OF LEAD-BASED PAINT ABATEMENT AND POISONING PREVENTION, INTERPRETIVE GUIDANCE FOR THE REAL ESTATE COMMUNITY ON THE REQUIREMENTS FOR DISCLOSURE ON INFORMATION CONCERNING LEAD-BASED PAINT IN HOUSING 3 (Aug. 20, 1996) ("...EPA and HUD believe that rental of rooms in fraternity and sorority houses generally fit that model and would be exempt.") [hereinafter "AUGUST 1996 GUIDANCE"].

disabled."[65] Congress did not explain its rational for these exemptions. Interpretive guidance issued by EPA and HUD seems to indicate that the 0-bedroom dwelling exemption was created because such a dwelling is usually occupied by single adults and not by young children.[66] A 0-bedroom dwelling was defined in the Disclosure Rule to mean any dwelling in which "the living area is not separated from the sleeping area...[which] includes efficiencies, studio apartments, dormitory housing, military barracks, and rentals of individual rooms in residential dwellings."[67]

The exemption for foreclosure sales of target housing was created because the purchaser, who subsequently becomes the seller or agent, is unlikely to know, and is not in a position to obtain, information from the previous owner about the housing. Thus, it will be difficult to ascertain if the housing contains lead-based paint or if a lead-report was created for the property. EPA and HUD acknowledged that very little interaction occurs, if any, between "the property owner and the purchaser, and mortgage holder or trustee."[68]

The exemption for leases of target housing found lead-based paint free is apparent in the term "lead-free." Lead-free is defined as "housing that has been found to be free of paint or other surface coatings that contains lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight."[69] Notably, this exemption applies only to target housing offered for lease. "Because of the distinct disclosure obligations [Section 1018] imposes on sellers [and] obligations purchasers assume upon purchase of the housing, EPA and HUD are not allowing the lead-based paint free exemptions for sales transactions."[70] If a particular target housing offered for lease has been found lead-free, then it is sensible that the Disclosure Rule should not apply to transactions regarding such

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65 42 U.S.C. § 4852d.

66 AUGUST 1996 GUIDANCE, *supra* note 64, at 3.

67 Final Rule, *supra* note 32, at 9071.

68 *Id.* at 9070.

69 *Id.*

70 *Id.* at 9067.

housing. EPA and HUD have stated in guidance that a copy of the inspection report indicating no lead-based paint in the target housing should be kept by the owner to prove that the property is lead-free.[71]

The exemption for short-term leases of 100 days or less generally covers month-to-month leases, seasonal vacation rentals, and hotel and motel transactions. The guidance issued by EPA and HUD does not address whether human health is in danger if a person resides in target housing for less than 100 days (i.e., whether it take less than 100 days for a child to suffer lead-poisoning).[72]

The exemption for renewal of an existing lease in which disclosure was previously made is based on a determination of EPA and HUD that duplicative disclosure provides no benefit.[73] Although not stated in the statute or rule, a transaction involving target housing transferred from one person to another as a gift is also exempt from disclosure requirements.[74]

IV. The Requirements of the Disclosure Rule

A. The Regulated Community

The Disclosure Rule defined the regulated community as sellers, agents and lessors. These terms were used in Section 1018 but not defined. Under the Disclosure Rule, a "seller' is defined as a person who "transfers legal title to target housing" in return for consideration.[75] "Agent" is defined by the Disclosure Rule as any person who enters into an agency relationship with another agent, a seller or lessor "for the purpose of selling or leasing target housing."[76]

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71 *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, OFF. OF POLLUTION PREVENTION AND TOXICS & U.S. HUD, OFF. OF LEAD-BASED PAINT ABATEMENT AND POISONING PREVENTION, INTERPRETIVE GUIDANCE FOR THE REAL ESTATE COMMUNITY ON THE REQUIREMENTS FOR DISCLOSURE ON INFORMATION CONCERNING LEAD-BASED PAINT IN HOUSING 2 (Dec. 5, 1996) [hereinafter "DECEMBER 1996 GUIDANCE"].

72 DECEMBER 1996 GUIDANCE, *supra* note 71, at 2.

73 Final Rule, *supra* note 32, at 9068.

74 DECEMBER 1996 GUIDANCE, *supra* note 71, at 2.

75 40 C.F.R. § 745.103 (1999).

76 *Id.*

A purchaser's agent, however, who receives all compensation from a purchaser of target housing does not have to comply with the Disclosure Rule.[77] This is an important exemption for buyers' agents who receive full compensation from their clients, but not from the seller. Under the definition of agent, any real estate attorney, acting as a broker or agent in a real estate transaction involving target housing, who receives compensation from the seller, must ensure compliance with the Disclosure Rule or else face the consequences of an enforcement action.[78] "Lessor" is defined as any person "offers target housing for lease, rent or sublease."[79] The definitions provided for seller, agent and lessor are so broad that they capture just about every member of the real estate community involved in the sale of target housing with narrow exceptions for those people who are only remotely involved in the transaction.

B. What is Specifically Required by the Rule?

Beyond the definition section of the Disclosure Rule, the requirements are presented and may be placed into three categories: (1) Disclosure; (2) Opportunity to Conduct an Inspection; and (3) Certification of Disclosure.

"Disclosure" requires that sellers, lessors and agents disclose the presence of any known lead-based paint and/or lead-based paint hazards to prospective purchasers and lessees. In addition, sellers, lessors and agents must provide purchasers and lessees with an EPA-approved pamphlet on lead-based paint and lead-based paint hazards, and a copy of any lead inspection report for the target housing offered for sale or lease.[80]

"Opportunity to Conduct an Evaluation" requires a seller to grant a purchaser a 10-day period to conduct an inspection of the target housing.[81] If a purchaser accepts this opportunity to conduct an

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77 *Id.*

78 *Id.*

79 *Id.*

80 40 C.F.R. § 745.107 (1999).

81 40 C.F.R. § 745.110(a) (1999).

inspection, then the purchaser must bear the total cost of the inspection, unless the seller or agent voluntarily agrees to contribute.[82] A purchaser may voluntarily waive this opportunity to inspect after the seller offers it.[83] This inspection requirement does not apply to rental transactions. [84]

"Certification" means that the disclosure of information must be memorialized. In a sales transaction for a contract to sell target housing, the parties must certify to seven statements and the Certification must be made as an attachment to the contract.[85] Parties to a lease must certify to six statements.[86] The Certification for a lease may be included as either an attachment or within the body of the lease.

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[82] The Disclosure Rule clearly states that the seller or lessor is under no financial obligation to pay for lead inspection. 40 C.F.R. § 745. 107(a) (1999).

[83] 40 C.F.R. § 745.110(b) ("a purchaser may waive the opportunity to conduct the risk assessment or inspection by so indicating in writing").

[84] 40 C.F.R. § 745.110 (statute refers only to "purchasers" and "contracts," and the terms "lessees" and "leases" are not included).

[85] 40 C.F.R. § 745.113 (Statute requires that the seller include in the contract a Lead Warning Statement, a statement by the seller disclosing the presence of known lead-based paint and/or lead-based paint hazards, a list of any records or reports pertaining to lead-based paint and/or lead-based paint hazards, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. §§ 745.113 (a)(2) and (a)(3), a statement by the purchaser that he/she has received opportunity to inspect required under 40 C.F.R. § 110(a) or waived such right, a statement from any agent involved concerning the agent's compliance, and the signatures of the parties certifying the accuracy of their statement.

[86] 40 C.F.R. § 745.113(b) (This subsection differs from 40 C.F.R. § 745.113(a) in that a contract for the sale of target housing, requires the Certification to be included as an attachment to the contract, whereas the Certification for a lease may be included either as an attachment or included in the lease. The six elements of the Certification are: a Lead Warning Statement, a statement by the seller disclosing the presence of known lead-based paint and/or lead-based paint hazards, a list of any records or reports pertaining to lead-based paint and/or lead-based paint hazards, a statement by the purchaser affirming receipt of the information set out in 40 C.F.R. §§ 745.113 (a)(2) and (a)(3), a statement from any agent involved concerning the agent's compliance, and the signatures of the parties certifying the accuracy of their statement.)

EPA prepared a sample disclosure form and published it in the Federal Register, and the EPA-approved pamphlets are easily obtainable by anyone who needs them.[87]

C. National Multi Housing Council v. EPA

Whether the real estate community has to disclose information on lead-based paint and/or lead-based paint hazards has not been free from controversy.

EPA and HUD may enforce the Disclosure Rule against any member of the real estate community who fails to disclose information on lead-based paint because a standard exists for lead-based paint. Lead-based paint is defined in the Disclosure Rule as "paint or other surface coatings that contains lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight."[88]

"Lead-based paint hazards" is defined as "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate Federal agency."[89] However, no standard currently exists for lead-based paint hazards, nor has the "appropriate Federal agency" established such.

Under subtitle B of Title X, Congress amended TSCA by adding Section 403, which directs EPA to issue regulations regarding lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil.[90] These regulations are collectively known as the 403 Rule.

EPA was sued by the National Multi Housing Council, National Apartment Association, and National Leased Housing Association because EPA issued an "interpretive guidance," in which

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87 Final Rule, *supra* note 32, at 9074-75.

88 40 C.F.R. § 745.103 (1999).

89 40 C.F.R. § 745.103 (1999).

90 Pub. L. No. 102-550, 106 Stat. 3912 (codified at 15 U.S.C. § 2683).

it stated that the real estate community must disclose the presence of lead-based paint hazards, but failed to issue the 403 Rule guidelines.[91] EPA responded that the matter was unripe for review because no standard for lead-based paint hazards had been issued. EPA also stated that it cannot enforce the interpretive guidance until the 403 Rule is issued.[92] The matter went before a federal district court judge and then to the District of Columbia Court of Appeals. The D.C. Court of Appeals found the matter to be unripe for review, given that EPA conceded that the "'guidance' is unenforceable."[93] EPA intends to issue the 403 Rule in the near future.[94]

V. Enforcement

A. Coordination of Enforcement by EPA and HUD

EPA and HUD are responsible for enforcing the Disclosure Rule, so to ensure efficient enforcement, they entered into a Memorandum of Understanding (MOU). On November 19, 1997,

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91 National Multi Housing Council, et al. v. EPA., No. 97-1372, 1999 WL 334511 at *2-5 (D.C. Cir. Apr. 15, 1999). The interpretive guidance here was presented in a question and answer format, which stated the following: Q: If a home has lead-containing non-glossy vinyl mini-blinds, must this be disclosed to fulfill the 1018 disclosure requirements? A: No. For purposes of section 1018, lead containing vinyl mini-blinds in and of themselves are not a lead-based paint hazard and their mere presence need not be disclosed. The lead in lead-containing non-glossy mini-blinds is not a component of paint or any other surface coating and, therefore, does not fall within the definition of "lead-based paint" under 24 C.F.R. § 35.85 and 40 C.F.R. § 745.103. Further, because a "lead-based paint hazard" as defined under 24 C.F.R. § 35.85 and 40 C.F.R. § 745.103 is a condition that causes exposure to lead in paint, or lead-contaminated dust or soil, the lead in mini-blinds could not constitute a lead-based paint hazard by virtue of its presence in the mini-blinds. *However, if the lead stabilizer in lead-containing mini-blinds breaks down into dust, it could contribute to lead contaminated dust and, therefore, could become a lead-based paint hazard which would have to be disclosed. Lead-contaminated dust, by definition means dust with lead above certain levels regardless of the source.* (Emphasis added).

92 National Multi Housing Council, *supra* note 91, at *7.

93 *Id.* at *8.

94 *Id.*

EPA Administrator Carol Browner and HUD Secretary Andrew Cuomo signed the MOU. The MOU provides that EPA and HUD will work closely together on enforcement and compliance of the Disclosure Rule[95].

. The MOU was announced at a White House Press Conference where the Administrator and the Secretary were joined by Tipper Gore.[96] Mrs. Gore announced the Clinton Administration's "Campaign for a Lead-Safe America" and spoke passionately about protecting America's children from the dangers of lead.[97] Under the MOU, both agencies agreed to appoint a Headquarter's Liaison. The MOU requires both agencies to share information, refer cases to each other when appropriate and to provide mutual assistance in compliance and enforcement to avoid any duplication of efforts.[98]

B. On-Site Inspections

EPA and HUD have established a joint tip and complaint hotline (800-424-LEAD) for members of the general public to report what they believe to be violations of the Disclosure Rule. The hotline has already received numerous tips and inquires about the Disclosure Rule from the public.

In addition to receiving tips and complaints from the general public, EPA and HUD have several procedures to determine compliance, and the most obvious procedure is to conduct on-site inspections to review sales contracts and leases involving target housing. These contracts and leases may be obtained by EPA and HUD inspectors when they conduct inspections at locations such as

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[95] EPA/HUD NEAR COMPLETION OF MOU TO IMPLEMENT LEAD PAINT DISCLOSURE RULE, INSIDE EPA WEEKLY REPORT (Inside Washington, Washington, D.C.), Aug. 8, 1997, at 17.

[96] DAVID RASMUSSEN, HUD, EPA TARGET CITIES FOR DISCLOSURE CRACKDOWN, LEAD DETECTION & ABATEMENT CONTRACTOR 1, 4 (Jan. 1998).

[97] MEMORANDUM OF UNDERSTANDING BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FOR THE ENFORCEMENT OF SECTION 1018 (Nov. 18, 1997) (on file with author).

[98] *Id.*

property management firms and rental offices. EPA and HUD have an army of highly professional inspectors in the Disclosure Rule enforcement program. These inspectors may appear at a place where such documents are kept, during business hours, to review leases and contracts, and if necessary, make copies of such documents. An inspector will present his identification to the person in charge of the office and state whether the inspection is being conducted as part of a neutral or random scheme, or in response to a tip and complaint alleging violations of the Disclosure Rule. The inspector will have a Notice of Inspection Form (NOI) that will state the date of the inspection and contain the scope of the inspection. The inspector will conduct an opening conference with the site representative to establish the purpose of the inspection and how the inspection will be conducted. At the end of the inspection, the inspector will hold a closing conference with the site representative to discuss factual issues relating to the inspection which will also be in the NOI. If any violation is discovered, the Inspector will not inform the site representative at any time during the inspection. The NOI will contain a list of the documents copied by the inspector and presented to the site representative for his/her signature.

C. Information Request Letters

EPA may also obtain copies of the contract or lease by issuing a consensual information request letter. Such a letter will state the purpose of the request and will usually provide the address of the target housing that is the subject of investigation. For example, an information request letter may request an agent to provide copies of any and all contracts for the sale of target housing at a particular place that the agent sold within a particular time period. The information request letter may also include a set of interrogatories, such as requesting that the recipient of the letter state whether the target housing is occupied by a young child.

D. TSCA Subpoena

EPA has subpoena authority under the Toxic Substances Control Act (TSCA) to require the regulated community to provide it with information relevant to the enforcement of the Disclosure Rule. Such authority stems from Section 1018(b)(5) which makes the Disclosure Rule a TSCA Rule.[99] Specifically, the Disclosure Rule is connected to the TSCA by way of TSCA § 409.[100] The TSCA provides that for purposes of administering the TSCA, EPA "may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary."[101] EPA has extremely broad powers under TSCA § 11(c) to gather information on any chemical substance.[102] For instance, in EPA v. Alyeska Pipeline Services Co., the Ninth Circuit upheld EPA's use of a TSCA subpoena in a Clean Water Act investigation to compel a representative of a water treatment company to appear to testify and produce documents concerning the discharge of chemical substances into a bay.[103]

In the context of the Disclosure Rule enforcement program, EPA has been successful in getting the TSCA subpoenas enforced in federal district court against members of the real estate community who fail to comply with them.[104] In U. S. v. Silverwood Realtors, EPA issued a TSCA subpoena to a property management firm requesting the production of documents such as leases and any lead reports.[105] The firm failed to comply with the TSCA subpoena, so EPA sought enforcement in district court.[106] After rejecting a series

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99 42 U.S.C. § 4852d(b)(5).

100 *Id.* ("It shall be a prohibited act under section 409 of the Toxic Substances Control Act for any person to fail or refuse to comply with . . . any rule . . . issued under this section").

101 Toxic Substances Control Act § 11(c), 15 U.S.C. § 2610(c) (1995).

102 *Id.*

103 EPA v. Alyeska Pipeline Services Co., 836 F.2d 443 (9th Cir. 1988).

104 U.S. v. Silverwood Realtors, No. 99-C-6625 (N.D. Ill. May 12, 2000).

105 *Id.*

106 *Id.* at 3.

of claims raised by the firm, such as the Disclosure Rule violated the commerce clause and that it was not rationally related to a legitimate government purpose, the district court held that the "information that the government requests is relevant to the investigation" and ordered the firm to immediately comply with the TSCA subpoena.[107]

Thus, lead, as a chemical substance, is subject to the TSCA as affirmed in U. S. v. Silverwood Realtors. EPA may issue a TSCA subpoena to compel the production of any lead inspection report or record for target housing, and any lease or sales contract for such housing to determine if information on lead was provided to prospective purchasers and lessees as required by the Disclosure Rule.

It would be unwise for any member of the real estate community to refuse or fail to comply with a TSCA subpoena because TSCA § 11(c) allows EPA to seek a judicial order from a U.S. district court for enforcement of a duly issued subpoena, and the failure to comply with an order from the U.S. district court could lead to civil and/or criminal claims.[108] In addition to possibly facing contempt, a person who fails to comply with a TSCA subpoena could be penalized in a separate administrative action and face paying a monetary penalty under the TSCA. The TSCA makes it clear that it is unlawful for any person to fail or refuse to "submit reports, notices, or other information."[109] The term "other information" may reasonably be interpreted as information requested under a TSCA subpoena. Any person who fails or refuses to provide information requested by EPA under a subpoena may make himself/herself liable for monetary penalties under TSCA § 16(a)(1).[110]

It is important to note that HUD does not have comparable subpoena authority that EPA has under the TSCA. HUD's Inspector General's Office, however, has subpoena authority to request documents from HUD grantees in the real estate community who

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107 *Id.* at 8.

108 *Id.*

109 Toxic Substances Control Act § 15(3)(B), 15 U.S.C. § 2614(3)(B) (1995).

110 15 U.S.C. § 2615(a)(1).

receive financial assistance from HUD, such as Section 8 grants, to review their documents relating to real estate transactions, including leases.

HUD's limited subpoena power is not a problem because under the MOU, EPA and HUD have agreed to cooperate on investigations, and such cooperation includes EPA using its subpoena power, when necessary, to obtain information and share such information with HUD.

VI. Monetary Penalties

A. The Enforcement Response Policy

In Section 1018(b)(5), Congress granted EPA authority to assess a penalty of up to $10,000 per violation against a violator of the Disclosure Rule,[111] and this amount was recently increased to $11,000.00 per violation.[112]

Whenever EPA administers an enforcement program, it usually issues an interim enforcement response policy (Interim ERP), so in January 1998, EPA issued the Interim ERP for the Disclosure Rule enforcement program.[113] The purpose of an ERP is to provide guidelines for the EPA Regions for responding to violations in a particular program. Generally, the proposed penalties in an ERP range from issuing a warning letter to a violator for a minor violation to the filing of a civil administrative complaint seeking a proposed monetary penalty for more serious violations. Thus, the Interim ERP was not much different from other ERP's issued by EPA in other environmental programs. Instead of issuing a separate Interim ERP,

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[111] Section 1018(b)(5) provides that "the penalty for each violation applicable under section 16 of that Act shall not be more than $10,000." 42 U.S.C. § 4852d(a)(5)(1995).

[112] Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. § 19 (1999).

[113] U. S. ENVIRONMENTAL PROTECTION AGENCY, OFF. OF ENFORCEMENT AND COMPLIANCE ASSURANCE, REAL ESTATE NOTIFICATION AND DISCLOSURE RULE INTERIM ENFORCEMENT RESPONSE POLICY (Jan. 1998) (on file with the author) [hereinafter INTERIM ERP]. *See also* NEW EPA ENFORCEMENT POLICY SEEKS TO PROTECT KIDS FROM LEAD-BASED PAINT, INSIDE EPA WEEKLY REPORT (Inside Washington, Washington, D.C.), Feb. 27, 1998 at 4.

HUD adopted the one issued by EPA.

The Interim ERP clearly states that enforcement activities are aimed at protecting young children and pregnant women from the dangers of lead.[114] The level of action for first-time violations of the Disclosure Rule is divided into two categories: egregious and nonegregious. An egregious violation will generally involve a violator who has failed to comply with the Disclosure Rule where a young child or pregnant woman resides in target housing unit.[115] In such a case, the violator will most likely be named as a respondent in a civil administrative penalty complaint.[116] For the violation to be nonegregious, no young child or pregnant woman must reside in the target housing unit.[117] A nonegregious violation ordinarily warrants a "Notice of Noncompliance" or a warning letter to the violator.[118]

On December 22, 1999, EPA and HUD issued the final enforcement response policy for the Disclosure Rule (Final ERP).[119] The Final ERP did not retain the "egregious" violation standard issued under the Interim ERP. Eliminating the egregious standard makes it easier for the EPA and HUD to bring enforcement actions against violators, e.g., no evidence that a child was poisoned by lead-based paint is necessary to prove a violation. Instead, the Final ERP puts the focus on the harm and hazard created by non-disclosure, but it also provides significant incentives to violators who may be able to receive reductions in the proposed monetary penalty by proving the target housing was lead-free at the time of the sale or lease.[120]

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114 INTERIM ERP, *supra* note 113, at 3.

115 *Id.* at 7.

116 INTERIM ERP, *supra* note 113, at 7.

117 *Id.*

118 *Id.*

119 U.S. ENVIRONMENTAL PROTECTION AGENCY, OFF. OF ENFORCEMENT AND COMPLIANCE ASSURANCE, SECTION 1018 OF TITLE X OF THE RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT- DISCLOSURE RULE ENFORCEMENT RESPONSE POLICY [hereinafter FINAL ERP] (Dec. 22, 1999), *available at* http://www.epa.gov/oeca/ore/tped.

120 *Id.*

B. How are Monetary Penalties Calculated?

Monetary penalties are significant if a child with elevated blood lead levels (10 ug/dl or above) resides in the target housing and disclosure was not made. In addition, the monetary penalties are high if a child or pregnant woman living in the target housing has been poisoned by lead and no disclosure was made. For a real estate transaction in which a violator fails to comply with any requirement of the Disclosure Rule, the proposed monetary penalty may be up to $60,000.[121]

In order to understand the Final ERP, it is essential to known how the gravity-based penalty (GBP) is calculated. In the Final ERP, there are three matrices: Circumstances Level Matrix (CLM), Extent Matrix (EM) and the GBP Matrix.[122] The first step in calculating a penalty is to use the CLM which determines the level of action. The levels range from one to six, with one being the most serious.[123] For example, under the CLM, a level one violation is the failure of the violator to provide the EPA approved lead hazard pamphlet and a level 6 violation is that failure of the violator to sign a disclosure form.[124] Evidently, EPA and HUD believe that the lead-hazard pamphlet is essential to prospective purchasers and lessees based upon the seriousness of the violation. On the other hand, the failure to sign a completed disclosure form may not be a serious offense. Thus, actual disclosure is more important than a signed form claiming disclosure.

The second step is to determine the extent of the violation by using the EM which has three categories: Major, Significant or

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[121] FINAL ERP, *supra* note 119, at C-5. To date, EPA has issued over 40 civil administrative complaints against members of the real estate community for violations of the Disclosure Rule with a total proposed penalty of over $800,000. HUD has also instituted several civil administrative complaints, one such complaint contained a total proposed penalty of over $6,000,000. *See* In re American Rental Management Company, et al., HUDALJ 99-01-CMP at 8 (May 26, 2000).

[122] FINAL ERP, *supra* note 119, at Appendix B.

[123] *Id.*

[124] *Id.*

Minor.[125] If the target housing is occupied by a pregnant woman, a child under six years old, or if the age of the occupant of the target housing is unknown, then the violation will be major.[126] If the youngest occupant in target housing is between six years old and eighteen years old, then that violation will be treated as significant.[127] Lastly, if the youngest occupant is 18 years old or older, then the violation will be considered minor.[128]

The final step is to match the CLM with the ELM in the GBP Matrix. The GBP Matrix contains the penalty amounts. For instance, the GBP for circumstances level one, major violation is $11,000.[129] Thus, a violator could face a high penalty for violations, and it is assessed per transaction.

C. Reductions to Monetary Penalties

The Final ERP provides a major reduction to any proposed monetary penalty assessed against a violator if he/she can prove that no lead-based paint was in the target housing at the time of the alleged violation.[130] A violator may receive an 80% reduction in the penalty if no lead-based paint is present in the target housing where the violation occurred.[131] The Final ERP offers many other opportunities for a violator to obtain significant reductions to the proposed GBP.

Small business owners are eligible for most of the downward adjustments in the ERP. For instance, a small business may receive a total elimination of the GBP if it meets the requirements of EPA's small business policy.[132] In addition, a small business that owns one

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125 FINAL ERP, *supra* note 119, at Appendix B.

126 *Id.* at B-4.

127 *Id.*

128 *Id.*

129 *Id.*

130 FINAL ERP, *supra* note 119, at Appendix B-16.

131 FINAL ERP, *supra* note 119, at Appendix B-16.

132 *Id.* at 17. *See also* Small Business Compliance Policy, 65 Fed. Reg. 19,630 (EPA 2000), *available at* http://www.epa.gov/smallbusiness.

target housing is entitled to a 50% automatic reduction.[133] Good attitude on the part of a violator may cause EPA and HUD to reduce the penalty by 30%.[134]

The Audit Policy is an important incentive offered by EPA and HUD to the real estate community, which would allow a violator to avoid paying any monetary penalty for violations.[135] If any member of the regulated community voluntarily conducts an internal audit and then reports any violation to EPA or HUD under the Audit Policy, he/she may receive a 100% reduction in the GBP.[136] For example a property management firm in Maryland conducted such an audit, self-reported violations to EPA, and met the conditions of the Audit Policy.[137] The firm received a total reduction to the GBP. If a violator self-reports the violation, but fails to meet the conditions of the Audit Policy, the violator may still eligible for a 50% reduction in the GBP for the voluntary disclosure under the Final ERP.[138]

The Final ERP makes clear that a violator may receive a downward adjustment to the GBP if he conducts a Supplemental Environmental Project (SEP).[139] An SEP is an "environmentally-beneficial project that a respondent agrees to conduct as part of settlement of an enforcement action" involving a monetary penalty.[140] Essentially, the respondent receives a reduction in the proposed monetary penalty by conducting an environmental project. As stated in the SEP Policy, the final settlement monetary penalty must equal or exceed either the economic benefit of noncompliance plus 10% of

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133 FINAL ERP, *supra* note 119, at 18.

134 *Id.* at 16.

135 Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 19,618 (EPA 1995), *available at* http://www.epa.gov/oeca/ore/apolguid.html.

136 *Id.*

137 *In re* Grady Management, Docket No. TSCA-III-737 (Sept. 9, 1998).

138 FINAL ERP, *supra* note 119, at 17.

139 Final EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24,796 (EPA 1998), *available at* http://www.epa.gov/oeca/sep/sepfinal.html [hereinafter Final SEP Policy].

140 *Id.* at 24,797.

the GBP or 25% of the GBP only, whichever is greater.[141] The critical element of an SEP is that EPA cannot legally compel a respondent to conduct an SEP, it must be voluntary.[142] The SEP Policy identifies seven categories which may qualify as SEPs.[143]

Four of the seven SEP Projects available in the SEP Policy are relevant to the Disclosure Rule and the first is a Public Health Project. Such a project is defined as "epidemiological data collection," "medical examinations" and "collection and analysis of blood samples."[144] These types of tests directly relate to treating childhood lead poisoning. For example, if a landlord fails to comply with the Disclosure Rule in a rental transaction, and young children reside in the apartment which contains lead-based paint, then the landlord could face a very high penalty for this violation. If the landlord voluntarily agrees to pay for the collection and analysis of blood samples for the young children and medical examinations, then the landlord would be eligible for a reduction in the proposed GBP under EPA's SEP Policy.

The second project is an Assessment and Audit Project, which includes an environmental compliance audit.[145] Such an audit is most relevant to the Disclosure Rule, and is defined as an independent evaluation of the violator's compliance with environmental requirements.[146] For instance, a large property management company in violation of the Disclosure Rule, with offices throughout the country, may conduct a company-wide audit to determine its level of compliance with the Disclosure Rule.

The third is an Environmental Compliance Promotion Project, which involves providing "training or technical support to other members of the regulated community" to achieve compliance with the

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141 *Id.* at 24,804.
142 *Id.* at 24,798.
143 *Id.* at 24,799-801.
144 *Id.* at 24,799.
145 *Id.* at 24,800.
146 *Id.*

"applicable statutory and regulatory requirements."[147] For example, as part of an SEP Project, a property management firm paid for a seminar on the requirements of the Disclosure Rule, which was attended by a large number of real estate professionals, and the firm received a significant reduction in the GBP.[148]

The most significant SEP which can permanently eliminate the danger posed by lead-based paint is an Environmental Restoration and Protection Project.[149] This type of SEP project is defined as one which involves the remediation of buildings, and includes the removal of contaminated materials such as lead paint, "a continuing source of releases and/or threat to individuals."[150]

VII. Injunctive Relief

A. Must the Real Estate Community Pay for Lead Abatement?

A major misconception about the Disclosure Rule is that it requires the regulated community to pay for lead abatement if lead based-paint exists in the target housing. The Disclosure Rule does not require any seller, lessor or agent to pay for lead-abatement in target housing that is being offered for sale or rent.[151] As a result, this erroneous belief likely contributes to noncompliance by some in the real estate community because they fear that by complying with the Disclosure Rule, a purchaser or lessee may refuse to go through with the transaction unless a lead inspection is done. More importantly, the seller, lessor or agent fear that they must bear the cost of lead abatement if the inspection reveals the presence of lead.

A federal court, however, may have the authority to compel

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147 *Id.*

148 *In re* Group One Realty, Inc., Docket No. TSCA VI-735C(L) (1998).

149 Final SEP Policy, *supra* note 139, at 24,799.

150 *Id.*

151 40 C.F.R. § 745.107(a) explicitly states that "[n]othing in this section implies a positive obligation on the seller or lessor to conduct any evaluation or reduction activities." Reduction is defined as any measure "designed to reduce or eliminate human exposure to lead-based paint hazards through methods including interim controls and abatement." 40 C.F.R. § 745.103 (1999).

a seller or lessor to abate lead-based paint under the TSCA to protect the public interest. Section 1018(b)(5) states, *inter alia*, that it is a prohibited act under TSCA § 409 for any person to fail to comply with any rule issued under the TSCA, i.e., the Disclosure Rule.[152] Under TSCA § 17(a)(1)(A), Congress granted federal courts jurisdiction over civil actions to restrain any violation of TSCA § 409.[153] Consequently, EPA may seek injunctive relief in a federal court for a violation of the Disclosure Rule. In granting such relief, a court in equity may direct a violator to take certain action to protect the public health, such as abatement.[154]

For example, if EPA seeks injunctive relief against a landlord who repeatedly violated the Disclosure Rule, and young children residing on the landlord's property are suffering from the effects of lead poisoning, similar to the Sausers' children, a federal district court may be well within its powers to compel the landlord to comply with the Disclosure Rule and pay for abatement to eliminate this public health hazard.

The U.S. Department of Justice (DOJ) is working with EPA and HUD and actively pursuing cases against violators of the Disclosure Rule who own target housing which contains deteriorated lead-based paint.[155] DOJ is working very closely with EPA and HUD in Chicago, New York, Los Angeles and the District of Columbia to identify such cases and seek judicial relief.[156]

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152 42 U.S.C. § 4852d(b)(5) (1995).

153 TSCA § 17(a)(1)(A) provides that "[t]he district courts of the United States shall have jurisdiction over civil actions to (A) restrain any violation of section 15 or 409 [15 U.S.C. § 2614 or 2689]." 15 U.S.C. § 2616(a)(1)(A) (1995).

154 Porter v. Warner, 328 U.S. 395, 398 (1946) (to protect the public interest, equitable powers of the court are broad and flexible). *See also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Virginia R. Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937) (equity will go to give relief where there is no adequate remedy at law).

155 *Id.*

156 *See, e.g., In re* American Rental Management Company, et al., HUDALJ 99-01-CMP (May 26, 2000).

VIII. Conclusion

EPA and HUD have been innovative in their approach to this program and have worked very well together given the enormous responsibility that Congress has placed on them, to protect America's children from lead. This is no small task. Congress must ensure that the EPA/HUD Disclosure Rule compliance and enforcement program is adequately funded to be effective, and then perhaps lead will no longer be the number one environmental hazard to American children.